Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-730 OF 1993
ANUAR CJ (MALAYA), WAN ADNAN FCJ AND GOPAL SRI RAM JCA
1 SEPTEMBER 1995

Labour Law *— Employment — Definition of 'workman' — Whether director of company could be workman — Whether general manager was a workman — Whether Industrial Court committed error of law — Test to be applied — Industrial Relations Act 1967 s 2*

Labour Law *— Employment — Contract of employment — Whether employee or independent contractor — Whether contract of service or contract for services — Degree of control exercised by employer — Duties and functions of employee*

Statutory Interpretation *— Construction of statutes — Liberal interpretation — Labour legislation — Purpose of — Approach to interpreting Industrial Relations Act 1967 — Meaning of 'workman' — Whether director or general manager could be a workman — Industrial Relations Act 1967 s 2*

The appellant was employed by Dorf Industries Pty Ltd ('Dorf') as the general manager of its Malaysian company in 1977. In 1983, Dorf was taken over by the respondent which continued to employ the appellant under a fresh agreement. The appellant was later promoted as the group general manager of the respondent's group of companies. However, in 1987, the respondent brought a charge of misconduct against the appellant, who was subsequently dismissed following a domestic inquiry. The appellant lodged a complaint under s 20(1) of the Industrial Relations Act 1967 ('the Act') which was then referred by the Minister to the Industrial Court for adjudication. Before hearing the case on its merits, the Industrial Court dealt with the preliminary issue as to whether the appellant came within the statutory definition of 'workman' appearing in s 2 of the Act. The court ruled that the appellant was a workman within the Act and made an award in his favour. The respondent then sought an order of prohibition in the High Court to restrain further conduct of the appellant's case before the Industrial Court on the ground that the appellant was not a workman. The respondent's counsel further complained that the Industrial Court had failed to make a proper assessment of the evidence and had given wrong reasons for the conclusion it arrived at in this case. The High Court judge held that the Industrial Court had committed an error of law in ruling that the appellant was a workman and thus issued an order of prohibition restraining the Industrial Court from hearing the appellant's complaint on its merits. The appellant appealed.

Held, allowing the appeal:

(1) When ascertaining the meaning of the term 'workman', it is important to bear in mind the nature of the legislation in which it appears so that the construction given truly reflects the collective will of Parliament. It is well settled that the Act is a piece of beneficent social legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with well-settled canons of construction, such legislation must receive a liberal and not a restricted interpretation. Thus, the expression 'workman' appearing in the Act should be liberally interpreted.

(2) As the word 'workman' is defined in the Act, it is not permissible to ascribe to it its common and ordinary meaning. The fact that the definition had been left unamended despite several amendments made to the Act, points to the conclusion that Parliament intended to keep the definition of 'workman' flexible, with a view of being worked out on a case by case basis.

(3) The flexible and correct approach to determine whether a claimant is a workman under the Act is to ascertain whether the contract is one of service or for services. A workman under the Act is one who is engaged under a contract of service whereas an independent contractor engaged under a contract for services is not.

(4) Where it is necessary to determine whether a contract is one of service or for services, the degree of control which an employer exercises over a claimant is an important factor, although not the sole criterion. The terms of the contract between the parties must first be ascertained to determine the nature of the claimant's duties and functions. However, in a majority of cases, there are facts which show the nature, degree and extent of control, and these include the conduct of the parties at all relevant times.

(5) The true principle is that it is incorrect to state in absolute terms that a company director can never be a workman. An examination of the functions of the claimant is always necessary to decide the question. In this case, the finding by the Industrial Court that the respondent was a workman, was correct as it was clear from the evidence and the terms of the appellant's agreement with the respondent, that the appellant had been engaged under a contract of service and not a contract for services.

(6) It is equally clear, from its award, that the Industrial Court did not commit any error of law when it came to its conclusion as it had addressed its mind to the nature of the duties and functions of the appellant as well as to the degree of control exercised by the respondent over him.

(7) An application for the prerogative order of prohibition is not an appeal and neither the High Court nor the Court of Appeal is entitled to review the merits of any decision reached by the Industrial Court.

(8) The reasons given by the Industrial Court for the decision it reached were not erroneous. In any event, assuming that the Industrial Court had given wrong reasons for holding that the appellant was a workman within the Act, its ultimate decision being correct, prerogative relief whether in the form of certiorari or prohibition, being discretionary remedies, ought to have been withheld from the respondent.

[Bahasa Malaysia summary

Perayu telah digaji oleh Dorf Industries Pty Ltd ('Dorf') sebagai pengurus besar syarikatnya di Malaysia pada tahun 1977. Pada tahun 1983, Dorf telah diambil alih oleh penentang yang telah terus menggaji perayu di bawah suatu perjanjian yang baru. Perayu kemudiannya telah dinaikkan pangkat sebagai pengurus besar kumpulan bagi kumpulan syarikat penentang. Walau bagaimanapun, pada tahun 1987, penentang telah membawa suatu pertuduhan salah laku terhadap perayu, yang telah dipecat ekoran daripada suatu penyiasatan domestik. Perayu membuat suatu aduan di bawah s 20(1) Akta Perhubungan Perusahaan 1967 ('Akta itu'), yang kemudiannya telah dirujukkan oleh Menteri ke Mahkamah Perusahaan untuk keputusan. Sebelum membicarakan kes itu atas meritnya, Mahkamah Perusahaan telah membincangkan isu permulaan sama ada perayu termasuk di dalam takrif statutori 'pekerja' yang muncul di dalam s 2 Akta itu. Mahkamah memutuskan bahawa perayu merupakan seorang pekerja di bawah Akta itu dan telah membuat award yang memihak kepadanya. Penentang seterusnya memohon untuk suatu perintah larangan di Mahkamah Tinggi untuk menghalang pengendalian kes perayu selanjutnya di Mahkamah Perusahaan atas alasan bahawa perayu bukan seorang pekerja. Peguam penentang juga telah mengadu bahawa Mahkamah Perusahaan telah gagal membuat suatu pentaksiran yang betul atas keterangan yang ada dan telah memberi sebab yang salah untuk keputusan yang telah dibuatnya di dalam kes ini. Hakim Mahkamah Tinggi memutuskan bahawa Mahkamah Perusahaan telah melakukan suatu kesilapan undang-undang dalam keputusannya bahawa perayu merupakan seorang pekerja, lalu mengeluarkan suatu perintah larangan untuk menghalang Mahkamah Perusahaan daripada membicarakan aduan perayu atas meritnya. Perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Apabila memastikan maksud istilah 'pekerja', adalah penting untuk mengingati sifat perundangan itu di mana istilah itu muncul supaya pentafsiran yang diberikan betul-betul akan mencerminkan hasrat kolektif Parlimen. Adalah mantap bahawa Akta itu merupakan suatu undang-undang kebajikan sosial dan Parlimen berniat supaya ia dapat menghalang dan menyelesaikan dengan cepat percanggahan di antara majikan dan pekerja mereka. Mengikut hukum pentafsiran yang telah mantap, undang-undang

sedemikian harus menerima pentafsiran yang longgar dan bukan terhad. Oleh itu, perkataan 'pekerja' yang muncul di dalam Akta itu seharusnya ditafsirkan dengan longgarnya. A

(2) Oleh kerana perkataan 'pekerja' ditakrifkan di dalam Akta itu, adalah tidak dibenarkan untuk memberikannya maksud biasa dan umum. Hakikat bahawa terma tersebut dibiarkan tidak dipinda walaupun terdapat beberapa pindaan kepada Akta itu, membawa kepada keputusan bahawa Parlimen berhasrat untuk memastikan bahawa takrif 'pekerja' adalah fleksibel, dengan tujuan supaya ia boleh ditakrifkan dari suatu kes ke suatu kes yang lain. B

(3) Pendekatan yang fleksibel dan betul untuk menentukan sama ada sesuatu pihak penuntut adalah seorang pekerja di bawah Akta itu ialah dengan memastikan sama ada kontrak yang berkenaan adalah suatu kontrak perkhidmatan atau kontrak untuk perkhidmatan. Seorang pekerja di bawah Akta itu adalah seorang yang digaji di bawah suatu kontrak perkhidmatan, manakala seorang kontraktor bebas yang digaji di bawah suatu kontrak untuk perkhidmatan bukan seorang pekerja. C D

(4) Di mana adalah perlu untuk menentukan sama ada suatu kontrak ialah kontrak perkhidmatan atau kontrak untuk perkhidmatan, tahap penguasaan yang dilaksanakan oleh majikan atas pihak penuntut adalah suatu faktor yang penting, sungguhpun ia bukan kriteria yang tunggal. Terma kontrak di antara pihak-pihak itu harus dipastikan terlebih dahulu untuk menentukan sifat tanggungjawab dan fungsi pihak penuntut. Walau bagaimanapun, dalam kebanyakan kes, terdapat fakta yang menunjukkan sifat, tahap dan takat penguasaan, dan ini termasuk kelakuan pihak-pihak pada semua masa yang relevan. E F

(5) Prinsip yang sebenarnya ialah bahawa adalah tidak betul untuk menyatakan di dalam terma yang mutlak bahawa seorang pengarah syarikat tidak boleh menjadi seorang pekerja. Suatu pemeriksaan fungsi pihak penuntut adalah selalunya perlu untuk menentukan soalan itu. Di dalam kes ini, keputusan Mahkamah Perusahaan bahawa penentang merupakan seorang pekerja, adalah betul kerana adalah jelas daripada keterangan dan terma perjanjian perayu dengan penentang, bahawa perayu telah digaji di bawah sesuatu kontrak perkhidmatan dan bukan suatu kontrak untuk perkhidmatan. G H

(6) Adalah sama jelas, daripada awardnya, bahawa Mahkamah Perusahaan tidak melakukan sebarang kesilapan undang-undang dalam mencapai keputusannya kerana ia telah menujukan fikirannya kepada sifat tanggungjawab dan fungsi perayu dan tahap penguasaan yang dilaksanakan oleh penentang ke atasnya. I

(7) Suatu permohonan untuk perintah prerogatif larangan tidak merupakan suatu rayuan dan Mahkamah Tinggi mahupun Mahkamah Rayuan tidak berhak untuk mengkaji semula merit sebarang keputusan yang dicapai oleh Mahkamah Perusahaan.

(8) Sebab-sebab yang diberikan oleh Mahkamah Perusahaan untuk keputusan yang dicapainya adalah tidak salah. Walau bagaimanapun, andaikan Mahkamah Perusahaan telah memberikan sebab yang salah untuk mencapai keputusan bahawa perayu adalah seorang pekerja di bawah Akta itu, oleh kerana keputusan muktamadnya adalah betul, relief prerogatif sama ada dalam bentuk certiorari atau perintah larangan, yang merupakan remedi budi bicara, tidak harus diberikan kepada penentang.]

Notes

For cases on the meaning of 'workman', see 8 *Mallal's Digest* (4th Ed) para 688; [1991] Mallal's Digest 1309; [1991] Mallal's Digest 1527.

For cases on construction of statutes, see 11 *Mallal's Digest* (4th Ed) paras 1308–1368; [1990] Mallal's Digest 1166; [1991] Mallal's Digest 1910; [1992] Mallal's Digest 1613–1624; [1993] Mallal's Digest 1250–1257.

Cases referred to

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147; [1969]1 All ER 208; [1969] 2 WLR 168 (refd)

Assunta Hospital v Dr A Dutt [1981] 1 MLJ 115 (refd)

Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141; [1982] 1 WLR 1155 (folld)

Dutt, Dr A v Assunta Hospital [1981] 1 MLJ 304 (folld)

HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd [1956] 3 All ER 624 (refd)

Haji Sarip bin Hamid & Anor v Patco Malaysia Bhd [1991] 1 MLJ 354 (refd)

Inchcape Malaysia Holdings Bhd v RB Gray [1985] 2 MLJ 297 (not folld)

Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v Industrial Court & Ors [1970] 1 MLJ 78 (refd)

Kewal Krishnan v Minister for Local Bodies & Ors AIR 1959 J & K 17 (folld)

Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915] AC 705 (refd)

Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 3 All ER 918 (folld)

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497; [1968] 2 WLR 775 (refd)

Sangram Singh v Election Tribunal AIR 1955 SC 425 (folld)

Short v J & W Henderson Ltd (1946) TLR 427 (folld)

State of Uttar Pradesh v Maharaja Dharmander Prasad Singh AIR 1989 SC 997 (refd)

Stevenson, Jordan & Harrison Ltd v Macdonald (1952) 1 TLR 101 (refd)

Syarikat 3M Malaysia Sdn Bhd v Nik Kamaruddin bin Ismail [1990] 1 MLJ 365 (folld)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd) A

Workmen of Indian Standards Institution v Management of Indian Standards Institution (1976) 1 LLJ 36 (folld)

Legislation referred to B

Industrial Relations Act 1967 ss 2, 20(1)

Appeal from: Originating Motion No R1–25–11–92 (High Court, Kuala Lumpur)

Vincent Chandran (*Shariza, Vareghese & Chandran*) for the appellant. C
N Sivabalah (*Shearn Delamore & Co*) for the respondent.

Cur Adv Vult

Gopal Sri Ram JCA (delivering the judgment of the court): This appeal D concerns a short but important point of principle. It has to do with the meaning of the term 'workman' appearing in s 2 of the Industrial Relations Act 1967 ('the Act') and whether the instant appellant comes within the statutory definition. Initially, after the delivery by the parties of the statement of case and statement in reply, the respondent invited the Industrial Court to adjudicate upon this question as a preliminary issue. That tribunal E having declined the invitation, the respondent moved the High Court which quashed the refusal and issued mandamus compelling the Industrial Court to hear and determine the point as a preliminary issue before proceeding to hear the case on its merits. In compliance with that order the Industrial Court proceeded to determine the question. It took evidence F and heard argument on the issue. Later, it made an award in the appellant's favour. It ruled that he was a workman within the Act.

The respondent then moved the High Court a second time. It sought an order of prohibition restraining further conduct of the appellant's case before the Industrial Court on the ground that the appellant was not a G workman. The learned judge who heard the application agreed with the respondent's argument. He held that the Industrial Court had committed an error of law in ruling that the appellant was a workman. Consequently, he issued an order of prohibition restraining the Industrial Court from hearing the appellant's complaint on its merits. It is against this order that the present appeal was brought. H

We heard this appeal on 8 August 1995 and, at the conclusion of arguments, allowed it, indicating to counsel that reasons for our decision would be given. These now follow.

The facts of this case in so far as they concern the instant appeal are not in dispute and they are as follows. On 7 December 1977, the appellant I was employed by Dorf Industries Pty Ltd ('Dorf') as the general manager of its Malaysian company. The terms and conditions upon which the

appellant was to serve Dorf are set out in a letter of that date. It reads as follows:

7 December 1977

Mr Frank KN Hoh
107 Jalan Limau Purut
Off Jalan Maarof
Kuala Lumpur

Dear Frank

Re: General Manager — Dorf (Malaysia) Sdn Bhd

Further to your recent interview, it is with pleasure that I advise you of your success in your application for the above position. In advising you of this, please note that it is subject to a satisfactory reference check by PA Management Consultants. In addition, they will require you to show evidence of your economics degree from ANU.

As far as the remuneration package and other details are concerned, we now list in detail our offer to you:

Position:	General Manager — Dorf (Malaysia) Sdn Bhd.
Responsible to:	To the board of directors through the General Manager, Dorf Industries Pty Ltd of Australia.
Responsible for:	Initially, your main task is the establishment of a viable manufacturing entity. As pointed out to you, the current marketing arrangements are likely to remain the same during this period, ie our current plans are that our agent will continue to market the company's products in Malaysia for the first year. Following the successful establishment phase of approximately 12 months, you will then be responsible for developing the total market scene in Malaysia. The development of the export market will be the responsibility of Dorf Industries Pty Ltd, Australia.
Remuneration package:	Basic salary ... RM3,000 per month
Bonus:	As discussed, this will be along the lines of the bonus scheme in operation in our parent company, National Consolidated Ltd. In essence, your bonus will be linked to the attainment of certain budget objectives which would enable you to earn a maximum bonus of 15% of your annual salary. For example, if budgetted profit is achieved, you immediately qualify for a 5% bonus. For every 1% that actual profit (*before tax and interest*) exceeds budget profit, you will qualify for a further 1%, up to a maximum of 5%. In total, therefore, your bonus based on a profit objective can be a maximum of 10%.

In addition, if your investment in debtors and stock is also better than budget as measured by the working day cover, then you will be eligible for a further 5% if both current asset targets are achieved. The bonus will be

calculated on the year's results, ie 1 July to 30 June each year and the first year that you will be eligible will consequently be the year 1978/1979.

Motor vehicle:	A fully maintained Peugeot 504. This will also include a company driver.
Provident Fund:	The company will contribute the usual 7% of the EP Fund.
Personal Accident cover:	RM100,000 as from the date of joining the company.
Annual leave:	Three weeks per annum. It is company policy that every effort be made to clear this entitlement each year.
Medical and hospital cover:	The company will take out a medical and hospital insurance policy covering you and your family for expenses of this nature up to a limit of RM5,000pa.
Telephone:	Total rental and telephone calls.
Salary review:	At least once a year, commencing 1 July 1979.
Termination Notice:	Two months' written notice by either party.

Furthermore, as discussed, we would want you to undergo a training period with us in Australia for approximately three months on your appointment and would meet the costs of your wife and child joining you in Australia towards the end of this period.

Frank, I am looking forward to your acceptance of this offer and to the contribution you can make to the achievement of the objectives we have set ourselves at Dorf Industries.

Could you please confirm your acceptance in writing including a starting date for this position.

With kind regards
—Sgd—
AC Dwyer
General Manager

In 1983, Dorf was taken over by the respondent which continued to employ the appellant. The respondent formalized the appellant's employment with it under a fresh agreement contained in its letter dated 7 November 1983. It is an important document. For that reason we set it out in full here.

7 November 1983

Mr Frank Hoh
107 Jalan Limau Purut
Off Jalan Maarof
Kuala Lumpur

Dear Frank

We are pleased to offer you employment with the company under the following terms and conditions:

A

1 *Designation of position*

General Manager with specific duties as Director/General Manager of Dorf (Malaysia) Sdn Bhd. You may be called upon to assume other duties and responsibilities at a later date.

2 *Job description*

B

As your position is a very senior one, it would not be appropriate to append the above; rather it would suffice to say that your duties are as I have discussed them with you.

3 *Senior officer*

C

Your immediate senior officer is the managing director of the company.

4 *Appointment date*

The date of your appointment is with immediate effect.

5 *Termination notice*

D

Termination notice for either party shall be three (3) calendar months' notice in writing or salary in lieu of notice thereof.

6 *Salary*

Your commencing salary shall be RM5,500 per month. Salary and all remuneration matters shall be treated with the strictest secrecy at all times and shall not be a subject for discussion except with your senior officer.

E

7 *Bonus*

We have two bonus systems. The service bonus will be given to you in accordance with the length of your service with the company. The merit bonus is entirely at the discretion of management.

F

8 *Employees' Provident Fund*

The company and you shall contribute monthly sums of money to the Employees' Provident Fund at the rates of 11% and 3% of your monthly salary, respectively.

G

9 *Medical attention and treatment*

Medical services are provided by our company doctors. This benefit is extended to cover your wife and family. Hospitalization and related costs are also extended to you and your family. Dental treatment costs will not be reimbursed.

H

10 *Insurance*

You shall be covered by the company-sponsored group personal accident insurance scheme equivalent to 36 months of your last drawn salary.

I

11 *Leave*

You shall be granted sixteen and one-half (16½) working days vacation leave for each year of completed service with the company to be taken

partially or fully at a mutually convenient time. Annual vacation leave shall not be accrued without written approval.

12 *Entertainment*

You will be reimbursed on all business entertainment on receipt of paid bills.

13 *Travelling allowance*

As you are already provided with a car by Dorf (M), this practice will continue until it is time for you to change the car. At that time, we shall discuss this matter again.

14 *Air travel*

You are entitled to first class air fares when travelling overseas.

15 *Retirement trust or superannuation fund*

The company is currently in the process of establishing a statutory approved retirement trust or superannuation fund for the staff and you will be invited to join the company's superannuation fund.

16 *Social and recreation club*

The company shall reimburse the monthly subscription to one approved social and recreation club in Kuala Lumpur.

17 *Other conditions*

(1) You will not during the continuance of your employment or thereafter except in the proper course of your duties as general manager divulge to any person whomsoever and shall use your best endeavours to prevent the publication or disclosure of any trade secrets or manufacturing process or confidential information concerning the business or finances of the company or any of its dealings transactions or affairs which may come to your knowledge during or in the course of your employment and shall not during the course of your employment permit or suffer to be done any damage or other injury to the property, customers or business of the company.

(2) Should you resign from the company on your own accord, you will not for a period of two (2) years next thereafter undertake or carry on either alone or in partnership nor be employed nor interested directly or indirectly in any capacity whatever in the business of roof tiling or in any other business carried on in Peninsular Malaysia and you shall not during the like period and within the same area either personally or by your agent, firm or company canvass or solicit from or in any way interfere with any person or persons who are the customers of the company.

We are enclosing two copies of this letter and request that you return to us the duplicate copy of this document duly signed by you at the appropriate place as soon as possible.

Yours sincerely
Vincent Tang
Managing Director
CI Holdings Bhd

A The appellant having proved himself, he was, in 1985, promoted as the group general manager of the respondent's group of companies. However, in consequence of certain matters that fall outside the purview of this appeal, the respondent, by a letter dated 16 January 1987, informed the appellant of a charge of misconduct brought against him. A domestic B inquiry followed, resulting in the dismissal of the appellant. Subsequently, the appellant lodged a complaint under s 20(1) of the Act with the appropriate authority. In due course, the appellant's complaint was referred by the Minister to the Industrial Court for adjudication. There then followed those events to which we have adverted earlier in this judgment.

C In arriving at their respective opposite conclusions upon the point, both the Industrial Court and the High Court relied on and applied the rather controversial decision of the precursor of this court in *Inchcape Malaysia Holdings Bhd v RB Gray* [1985] 2 MLJ 297. We therefore find it necessary, as a first step to the determination of this appeal, to address our minds to that case and ascertain exactly what it decided.

D To recall, the facts of *Inchcape* were these. Inchcape, like the instant appellant, was a holding company having a number of subsidiaries within its group of companies. Among its subsidiaries were two companies, namely, IAD and MA. Gray entered into a contract of employment with E Inchcape under the terms of which he was to serve as a director of IAD and MA upon conditions applicable to expatriate employees. Inchcape ensured that resolutions were passed by the two subsidiaries to formalize Gray's appointment as a director. Later, by a letter dated 3 December 1979, Inchcape terminated Gray's services in accordance with the terms of his contract. The judgments of their Lordships of the Supreme Court do F not contain any reference to the terms of that letter. We have therefore, *ex abundanti cautela*, called for the record of proceedings in that appeal to advise ourselves of the contents of the letter of termination served by Inchcape upon Gray. We have done so in order to emphasize a matter of vital importance in the fact pattern of that case. The letter, shorn of its G formalities, reads as follows:

> Further to our discussion with regard to your future, I am writing *on behalf of the Board* to formally give notice of termination of your employment under cl 10 of your contract *with the Group*.
>
> As agreed, you will continue to carry out your present duties, as H required, until your hand-over to Mr Cregan is completed, which will be finalized by 5 January 1980 latest.
>
> We would also confirm we will pay you the salary in lieu of notice, as specified in cl 10 of your contract, calculated from your last day of service on 5 January 1980.
>
> The Board joins me in thanking you for your contribution over the last I three years and wish you every success for the future. (Emphasis added.)
>
> Yours sincerely
> —Sgd—
> DC Denman
> Director

Gray, being dissatisfied with this state of affairs, lodged a complaint under s 20(1) of the Act, claiming that he had been wrongfully dismissed. His complaint was referred to the Industrial Court before which a preliminary objection as to jurisdiction was raised on the ground that Gray was not a workman within the Act. The Industrial Court ruled that he was, and that it therefore had jurisdiction to hear the complaint on its merits. An application for an order of prohibition was refused by the High Court. Inchcape successfully appealed to the Supreme Court against this refusal.

In the Supreme Court, separate judgments were handed down by their Lordships giving reasons for reversing the High Court and issuing prohibition. However, only the Lord President and Seah SCJ addressed the issue of whether Gray was a workman. We therefore propose to confine our discussion to their judgments. But before we do so, it is necessary to make some preliminary comments upon the facts of the *Inchcape* case.

First, we observe that while Gray did serve as a director of IAD and MA, it was Inchcape and not the two subsidiaries that employed him. True, that Gray carried out the duties of a director in these two companies. But to the question: who was Gray's employer? comes the answer: it was Inchcape. In essence, his tenure of service with the two subsidiaries depended, not upon any contract he had with each of them, but solely upon the contract he had with Inchcape. So if one were to view the case from the point of privity of contract, it is quite clear that none existed between Gray and each of the subsidiaries.

Second, it follows from what we have said a moment ago, that the power to dismiss Gray from his employment rested in Inchcape and not the two subsidiaries. The letter of termination bears this out. It confirms that it was the Board of Inchcape, and not the Board of IAD or MA which terminated the contract which Gray had with the Inchcape Group of Companies. Had he been engaged by IAD or MA to serve as their director, one would expect the letter of termination to come from either of them. It is therefore a fair conclusion that Gray agreed to serve Inchcape, not its subsidiaries. Indeed, the language in which the letter is couched supports this conclusion.

Third, there is the fact that Gray was never appointed as a director of Inchcape. There was no resolution to that effect nor a director's service contract. When this was drawn to his attention during argument, counsel for the respondent submitted that it was the purpose for which Gray was employed that was important and not the identity of his employer. With respect, this submission misses the point that under the Act, the identity of the employer is a matter of vital importance. Further, what is of moment is that Gray's designation as director did not place him in any position of authority in the corporation that employed him.

We have made these observations in order that the reasons appearing in the judgments of their Lordships in that case may be properly appreciated. With that we proceed with an examination of the judgments.

A The principal judgment was delivered by Salleh Abas LP. In it are two passages that require careful examination. The first of these is to be found at p 300 of the report. It reads as follows:

> The starting point for the consideration of this question is the definition of 'workman' in the IRA, which is as follows:
>
> B '"workman" means any person, including an apprentice employed by an employer under a *contract of employment* to work for hire or reward, and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.'
>
> C According to this definition, a workman is a person employed under '*a contract of employment*', and in the case of a trade dispute, he is a person whose dismissal, discharge or retrenchment from employment leads to or is the cause of the dispute. But what is a contract of employment and what is a trade dispute?
>
> D Contract of employment is defined by the Act to mean 'any agreement whether oral or in writing and whether express or implied, whereby the person agrees to employ another *as a workman* and that other agrees to serve his employer as a *workman*'.
>
> And trade dispute is defined to mean 'any dispute between an employer and his workmen which is connected with the employment or non-
> E employment or the terms of employment, or conditions of work of any such workmen'.
>
> The combined effect of these definitions is that a person is a workman if the contract of employment under which he is employed requires him to serve his employer *as a workman* and in the case of a trade dispute a person is a workman if the dispute between him and his employer is connected with
> F his employment *as a workman*. The definition, therefore, does not go very far and in fact it goes in circle. I am still left with the same question: who is a workman? But one thing is clear in that whilst a contract of employment is part of the definition, it does not follow that every person who is employed under a contract of employment or being an employee of another is a workman. To be a workman a person must be employed as a workman. If
> G he is employed in other capacity he cannot be a workman.
>
> *There can be no doubt that the relationship between the appellant and the respondent by virtue of the contract of employment dated 25 June 1977 was that they were master and servant, or employer and employee. But this fact is neither here nor there, because the important criterion is the capacity or purpose for which the respondent was employed. The contract of employment in this case says that*
> H *the respondent was employed as a director. Surely, common sense tells me that a director and a workman are poles apart and not synonymous. A director occupies a special position in the company and has different type of responsibilities from those of an ordinary employee of the company. By specifying in the contract that the respondent was employed as a director the parties to the contract must have intended that the respondent was not to be regarded as a workman.* On this
> I ground alone I could hold that the ruling by the Industrial Court was erroneous. [Emphasis added.]

Again, at p 304 of the report, the learned Lord President said:

> We were urged to disregard the expression 'as a workman' as being a mere labelling. I cannot agree. I have no right to treat it as mere surplusage. It was

included there for good measure just as the words 'or otherwise' in the *National Arbitration Tribunal* case (supra) [*R v National Arbitration Tribunal ex p Bolton Corp* [1941] 1 KB 584; [1941] 2 KB 405; [1943] AC 166] were held to extend the definition beyond the natural and common sense meaning of the word 'workman'. *In my view the expression 'as a workman' indicates the intention of the legislature in that in construing the term 'workman', the purpose for which a person is employed must be taken into consideration. In other words, the function and responsibility of an employee are the criterion and must be looked into.*

Now, let me look at the function of the respondent and the purpose for which he was employed by the appellant.

The letter of offer of employment and acceptance as well as the contract of employment clearly state that the respondent was employed as a director. Pursuant to this employment, the appellant took the necessary measures to have the respondent appointed as an executive director of IAD and a number of other companies within the appellant's group. *As a director, the respondent on behalf of the companies of which he was a director, recruited employees of the companies and even terminated their services. With regard to the relationship between the appellant and their employees the respondent acted in the capacity of an employer and signed collective agreements on behalf of the appellant. Under the law as a director the respondent is the very brain of the companies or their directing mind determining and formulating the companies' policy. Thus I cannot see how in the circumstances of this case, the respondent could be held to be a workman.* I hold that the ruling of the Industrial Court on this issue is clearly erroneous. [Emphasis added.]

Before we turn to examine the judgment of Seah SCJ, we propose to deal with the following propositions, both in point of principle and contextual, which we have extracted from the foregoing passages in the judgment of the Lord President.

(1) The relationship of master and servant is not a relevant consideration in an inquiry directed at the meaning to be ascribed to the expression 'workman' appearing in s 2 of the Act. Since this statement of principle constitutes a departure from earlier decisions of our courts, it requires full discussion. We shall accordingly deal with it later in this judgment.

(2) The question: Who is a workman? is to be resolved by reference to the capacity in which, or the purpose for which, one is employed and this is clearly indicated by the use of the phrase 'as a workman' by the legislature in the definition of the expression 'contract of employment'.

With respect, the capacity in which one is employed or the purpose of the employment does not answer the question at hand. It may be, as was the case of Gray, that the purpose of Inchcape employing him was to run the whole of the affairs of a subsidiary. But that fact in itself would not exclude him from being a workman.

Take the case of a company with several autonomous departments within it. A man may be employed as the head of a particular department with carte blanche powers. He would then have sole control over all and sundry who are subordinate to him in that

department. He may also be given the artificial designation of 'director' without being a member of his employer's Board. But, vis-à-vis the company who employs him, he would still be its workman.

Again, take the illustration that was put to counsel during argument. Assume for a moment that an employer appoints his chauffeur as a director of one of his companies to hide his own involvement in it. The contract may provide that he is to be engaged as a director of the particular company. That is the purpose intended by the contract. One may find cheques and resolutions signed by him. Yet in truth, all that he does is to drive his employer to and from work. So one may find a case where the purpose of employment, namely, as a director, disclosed in the contract to be quite different from the duties actually performed.

In the course of the discussion of this illustration, counsel had perforce to concede that, in respect of the example given, the director would be a workman. This shows the true principle: that it is the functions of and the duties actually discharged by the particular claimant that is important and not merely the label that is attached to the particular employment or indeed the purpose of the engagement.

(3) Because the contract expressly specified that Gray was employed as a director, the parties intended that Gray was not to be regarded as a workman. With respect, it would appear that in making this contextual statement, the learned Lord President overlooked the fact that Gray was never employed *as a director of Inchcape*. He was employed by Inchcape to serve on the Board of one or more of its subsidiaries. It would therefore appear that in this instance, at least, the learned Lord President was looking at the label used by the parties rather than the substance.

(4) Under the law, Gray was the very brain or the directing mind of the companies of which he was a director. He was therefore not a workman. Accepting for a moment that the asking of the question: was Gray the brain or directing mind of the subsidiaries? to be the correct test, surely, the answer is 'yes.' But he was never the brain or directing mind of Inchcape. He was employed to direct, not his employer's mind but the minds of companies solely controlled by his employer. It was as a necessary adjunct of that function that he was given the power to hire and dismiss. But that power was exercised in the discharge of his duties not as a director of Inchcape's Board.

We now proceed to consider the judgment of Seah SCJ from which we quote the following passages ([1985] 2 MLJ 297 at pp 317–318):

> I come now to consider the director's contract of employment dated 25 June 1977. Under the terms and conditions of this document it is patently clear and it was conceded by learned counsel for the first respondent that the first respondent was employed by the appellants to carry out the duties and functions of a company director. The question is whether a company director includes a 'workman' within the meaning of s 2 of the Industrial Relations Act 1967 (as amended). I have already said that the Act postulates

that there should be an employer on the one side and workman on the other side. *A company director has been said to represent the directing mind and will of the company, the very ego and centre of the personality of the company.* (*Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 per Viscount Haldane LC at p 713 and Denning LJ in *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624.)

A company director may not be regarded as a servant of the company [*Re TN Farrer Ltd* [1937] 2 All ER 505 at p 508 per Simonds and Eve JJ in *Re Lee Behrens Co Ltd* [1932] 2 Ch 46. A director is not a servant (see *Hutton v West Cork Ry Co* (1883) 23 Ch D 654, per Bowen LJ).

If a company director is to be regarded as representing the mind and will of the company and may not be treated as a servant of the company it would be strangely out of date (to borrow a phrase of Viscount Simon LC in *National Association of Local Government Officers v Bolton Corp* [1942] 2 All ER 425 at p 435) *nowadays to urge the Industrial Court to construe a company director, in the more complex conditions of modern companies, to include a 'workman'. Such a construction would place the company director in conflict with his duties and loyalty towards his employer and the company whom he represents.* The proposition has only to be stated in order to make one realize how untenable it is. I am unable to accept it. In short, the simple test appears to be this: *if a person or a company director can be regarded either expressly or by necessary implication, as representing the company in the course of the trading activities of the company, he ought not to be treated as a workman under the Act.* Some support for this proposition may be found in the *Bolton Engineering* case at p 630 where Denning LJ said:

> 'Others are directors and managers who represent the directing mind and will of the company and control what they do. The state of mind of these directors and managers is the state of mind of the company and is treated by the law as such.'

On the facts of this case I hold that the first respondent had failed to bring his case within this test and the Industrial Court ought to have ruled that the first respondent was not a 'workman' within the meaning assigned to the word contained in s 2 of the Industrial Relations Act 1967 (as amended). When the Industrial Court purported to hold that the first respondent was a 'workman' under the Act, in my opinion, the Industrial Court had acted in excess of its jurisdiction and therefore the ruling was a nullity. [Emphasis added.]

Now, it is clear that his Lordship's reasoning for the conclusion he arrived at was largely, if not altogether, influenced by the decision in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 and by the oft-quoted passage in the judgment of Denning LJ in *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* [1956] 3 All ER 624. Indeed, when alluding to the symbolic representation of a company as a human form in the latter case, Denning LJ himself relied upon the speech of Viscount Haldane in *Lennard.* This, no doubt, led Seah SCJ to formulate the far-reaching proposition: 'If a person or a company director can be regarded either expressly or by necessary implication, as representing the company in the course of the trading activities of the company, he ought not to be treated as a workman under the Act.'

Having had the relevant passages in the speech of Viscount Haldane in *Lennard* read to us during argument and having read it again, we are satisfied that that learned Law Lord was not stating or even attempting to state any principle of universal application in the sphere of company law. Indeed, we are of opinion that Viscount Haldane never intended his observations to be used as a key in the interpretation of the term 'workman' in s 2 of the Act. That is a task requiring an independent exercise having regard to the language of the statute and the purpose for its enactment. We may add that we regard the symbolic representation alluded to by Denning LJ in *Bolton* as an over-simplification of the several rules, both statutory and common law, that go toward placing a company on the same footing as a natural person in the context of attributing to a corporation the acts done by its officers or their knowledge or state of mind upon any given matter.

For the views just expressed, we draw support from the recent decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*. That case is yet to be reported in any of the Law Reports. [This case has since been reported in [1995] 3 All ER 918]. The only report of it is in the *Times of London* for 29 June 1995, and it is from that report of the judgment of Lord Hoffmann that we now quote:

> The phrase 'directing mind and will' came from the speech of Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at p 713. *But there had been some misunderstanding of the true principle upon which that case was decided.*
>
> Any proposition about a company necessarily involved a reference to a set of rules. A company existed because there was a rule, usually in a statute, which said that a *persona ficta* should be deemed to exist and to have certain of the powers, rights and duties of a natural person. It was a necessary part of corporate personality that there should be rules by which acts were attributed to the company: the rules of attribution.
>
> The company's primary rules of attribution would generally be found in its constitution, typically the articles of association, but were also implied by company law.
>
> Those primary rules of attribution were not enough to enable a company to go out into the world and do business. The company therefore used general rules of attribution equally available to natural persons, namely, the principles of agency.
>
> *It appointed servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, counted as the acts of the company.* And having done so, it would also make itself subject to the general rules by which liability for the acts of others could be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.
>
> Any statement about what a company had or had not done, or could or could not do, was necessarily a reference to the rules of attribution, primary and general, as they applied to that company. There was no such thing as the company as such, only the applicable rules.

To say that a company could not do something meant only that there was no one whose doing of that act would, under the applicable rules of attribution, count as an act of the company. A

The company's primary rules of attribution together with the general principles of agency and so forth were usually sufficient to enable one to determine its rights and obligations.

In exceptional cases, however, they would not provide an answer. That would be the case when a rule of law expressly or by implication excluded attribution on the basis of the general principles of agency or vicarious liability. B

That was generally true of rules of the criminal law, which ordinarily imposed liability only for the actus reus and mens rea of the defendant himself. How was such a rule to be applied to a company? C

The court might conclude that the rule was not intended to apply to companies at all, or the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, that is, if the act giving rise to liability was specifically authorized by a resolution of the board or a unanimous agreement of the shareholders. D

But there would be many cases in which neither of those solutions was satisfactory and the court had to fashion a special rule of attribution for the particular substantive rule.

That was always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act or knowledge or state of mind was for that purpose intended to count as the act, knowledge or state of mind of the company? E

The answer was to be found by applying the usual canons of interpretation, taking into account the language of the rule, if it was a statute, and its content and policy.

The fact that the rule of attribution was a matter of interpretation or construction of the relevant substantive rule was shown by the contrast between two decisions of the House of Lords: *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 and *In re Supply of Ready Mixed Concrete (No 2)* [1995] 1 AC 456. F

In Lennard's case the substantive provision for which an attribution rule had to be devised was s 502 of the Merchant Shipping Act 1894, which provided a shipowner with a defence to a claim for loss of cargo. G

Guided by the language and purpose of the section, Viscount Haldane had looked for the person whose functions in the company, in relation to the cause of the casualty, were the same as those to be expected of the individual shipowner to whom the language primarily applied.

That person was Mr Lennard, whom Viscount Haldane had described as the 'directing mind and will' of the company. It was therefore his fault or privity which s 502 attributed to the company. H

Because that company did not do anything except own ships, there was no need to distinguish between the person who fulfilled the function of running the company's business in general and the person whose functions corresponded, in relation to the cause of the casualty, to those of an individual shipowner. I

They were one and the same person. It was that coincidence which left Viscount Haldane's speech open to the interpretation that he was expounding a general metaphysic of companies.

A In *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 Denning LJ certainly regarded it as a generalization about companies as such when (at p 172) he likened a company to a human body.

But that anthropomorphism distracted attention from the purpose for which Viscount Haldane had said he was using the notion of directing mind and will, namely to apply the attribution rule derived from s 502 to the particular defendant B *in the case.*

The true nature of the exercise became clearer in later cases on the Merchant Shipping Act 1894: *The Truculent* [1952] P 1 and *The Lady Gwendolen* [1965] P 294.

The phrase 'directing mind and will' did not fit the facts of those two C cases as happily as it did those of *Lennard*'s case. The difficulty had been caused by concentration on that particular phrase rather than the purpose for which Viscount Haldane was using it.

It would often be the most appropriate description of the person designated by the relevant attribution rule but it might be better to acknowledge that not every such rule had to be forced into the same formula. (Emphasis added.)

D The passages in the advice of the Board upon which we have placed emphasis go to show how out of place it would be to rely upon the pronouncement of Viscount Haldane in *Lennard* or the generalization of Denning LJ in *Bolton* when interpreting a provision in a statute (in this instance a statute regulating industrial harmony) which is unconcerned E with the application of one or more of the rules of attribution which render a corporation liable for the acts of its officers or by means of which the state of mind of those officers is attributed to it.

We now turn to ascertain the meaning to be ascribed to the term 'workman' appearing in the Act. In undertaking this task, it is important to F bear in mind the nature of the legislation in which the term calling for interpretation appears. This approach is necessary to ensure that the construction placed truly reflects the collective will of Parliament and does not produce a result not intended by it.

Now, it is well settled that the Act is a piece of beneficent social G legislation by which Parliament intends the prevention and speedy resolution of disputes between employers and their workmen. In accordance with well settled canons of construction, such legislation must receive a liberal and not a restricted or rigid interpretation. If authority is required for this proposition, it is to be found in the decision of the Court of Appeal in H *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317. The three interconnected definitions which were cited by Salleh Abas LP in his judgment in *Inchcape* as well as s 20 (under which the instant respondent's case was referred to the Industrial Court) appear in a statute requiring liberal interpretation and for that reason should themselves be liberally interpreted.

I It is true, as was observed by the learned Lord President in *Inchcape* that the definitions of the expressions 'contract of employment', 'trade dispute' and 'workman' are circuitous and do not appear to take one very far along the road to clarity. His Lordship took the view that the path to

severing the Gordian knot lay in the phrase 'as a workman' appearing in the definition of the phrase 'contract of employment'. With respect, that approach, in our judgment, does not assist because of the appearance of the expression 'workman' in the phrase under consideration. What Salleh Abas LP in effect did at that stage of the process of reasoning was to ascribe to the word 'workman' its common and ordinary meaning. This is certainly not permissible because the statute has already assigned a meaning to that term. So one is still left with the apparent tautology in the Act.

In our judgment, there is a very good reason for Parliament to have provided these definitions and left them in the state in which they appear, untouched by the several amendments made to the Act since its original enactment. This points to the conclusion that Parliament intended to keep the definition of the term 'workman' flexible, with a view of being worked out on a case by case basis. It was not the intention of Parliament to assign a fixed or rigid meaning to these expressions. We would in this context gratefully adopt what was said by Bhagwati J in *Workmen of Indian Standards Institution v Management of Indian Standards Institution* (1976) 1 LLJ 36 at p 43 in relation to the definition of the term 'industry' in the parallel Indian statute:

> [I]t is necessary to remember that the Industrial Disputes Act 1947 is a legislation intended to bring about peace and harmony between management and labour in an 'industry' so that production does not suffer and at the same time, labour is not exploited and discontented and, therefore, the tests must be so applied as to give the widest possible connotation to the term 'industry'. *Whenever a question arises whether a particular concern is an 'industry', the approach must be broad and liberal and not rigid or doctrinaire.* We cannot forget that it is a social welfare legislation we are interpreting and we must place such an interpretation as would advance the object and purpose of legislation and give full meaning and effect to it in the achievement to (sic) its avowed social objective. (Emphasis supplied.)

It was held in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 that the determination whether a particular claimant is a workman under the Act is:

> ... a mixed question of fact and law and it is for the Industrial Court to determine this question. The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for (sic) service: see also *Australian Timber Workers Union v Monaro Sawmills Pty Ltd* (1980) 29 ALR 322 (per Chang Min Tat FJ at p 310).

It is clear that the Federal Court was of the view that the definition under consideration applied to all contracts of service but not to independent contractors who are engaged under a contract for services. The approach that commended itself to the Federal Court certainly ensures the flexibility intended by Parliament.

No doubt the decision of the Federal Court in *Dutt* was severely criticized by the Supreme Court in *Inchcape*. However, a careful reading of the judgments of Salleh Abas LP and Seah FCJ shows that the criticism of their Lordships was directed against an observation of the Federal Court in an earlier decision in the same case. (See, *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115). The passage in the judgment of Chang Min Tat FJ in the earlier case which did not find favour with the Supreme Court is to be found at p 116 of the report and reads as follows:

> Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for mandamus.

We observe that this passage is in essence a mere restatement and application of the proposition formulated by an earlier decision of the Federal Court in *Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v Industrial Court & Ors* [1970] 1 MLJ 78 at p 81 where Suffian FJ (as he then was) said:

> When the matter has been referred to the Industrial Court by the Minister in the proper exercise of his power, what is the Industrial Court to do? Can it decline to act? I do not think so. *The scheme of the Act read as a whole is that once a dispute of this nature has been referred by the Minister to the Industrial Court, the court is at once invested with jurisdiction and is obliged to decide one way or another.* That this is so is clear from ss 27 and 9. (Emphasis added.)

These decisions correctly recognize the dichotomy between the Minister's act of referring a dispute to the Industrial Court and the jurisdiction of that court to enter upon the inquiry. But, the 'jurisdiction' mentioned in these cases refers to the narrow jurisdiction of an inferior tribunal to enter upon an inquiry and not to 'jurisdiction' in the wider sense. Lawyers sometimes refer to this kind of jurisdiction as 'threshold jurisdiction'. For an inferior tribunal may have jurisdiction in the narrow sense and yet make an invalid decision.

The distinction between jurisdiction at the threshold of an inquiry and the wider concept of that term is well brought out in the following passage in the speech of Lord Reid in the landmark decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 at p 171; [1969]1 All ER 208 at p 213; [1969] 2 WLR 168 at 170:

> It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and *I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question.* But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question

> remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *R v Governor of Brixton Prison, ex p Armah* [1968] AC 192 at p 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.

In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*, the Court of Appeal correctly recognized that *Anisminic* had done away with the distinction between errors of law that go to jurisdiction and errors that do not. We are of the opinion that the following extract from the judgment of the Court of Appeal accurately declares the present state of the law ([1995] 2 MLJ 317 at p 342):

> An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.
>
> Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted.

The criticism by the Supreme Court in *Inchcape* of the Federal Court in the earlier decision in *Dutt* appears to hinge upon the inability of the Industrial Court to assume threshold jurisdiction if the claimant in a particular case is found not to be a workman. But this approach overlooks the difficulties that are bound to arise in respect of the area over which the threshold jurisdiction is exercisable. (See, for example, *Haji Sarip bin Hamid & Anor v Patco Malaysia Bhd* [1991] 1 MLJ 354.)

A We do not read the decision in *Inchcape* as deciding that the Industrial Court has no jurisdiction to decide whether a particular claimant is a workman. Instead, that decision should be read, as we read it, that a finding by the Industrial Court that a claimant is or is not (as the case may be) a workman within the Act is not conclusive and is subject to judicial review upon a motion for one or more of the prerogative orders. Viewed B from this perspective, we find no error of principle in the passage in the judgment of Chang Min Tat FJ delivered in the earlier decision in *Dutt* that was adversely commented upon by Salleh Abas LP in *Inchcape*.

As observed earlier, the Federal Court in its judgment handed down in the second decision in *Dutt* held that the test to be applied in determining C whether a person is a workman is to ascertain whether the contract is one of service or for services. The qualification made by *Inchcape* to *Dutt* is that one who is engaged under a contract of service to act as a company director, even of a subsidiary of his employer, cannot by reason of his designation be a workman. It would appear that the test laid down in *Dutt* D has not survived the decision in *Inchcape*, although nowhere in the judgments in that case is there any indication that the second decision in *Dutt* was wrong and should be overruled. Nevertheless, in our judgment, the observations made by Salleh Abas LP and Seah SCJ concerning Gray's role as the brain or directing mind and will of the company (it was not, as earlier pointed out, Inchcape) must be read as being confined to the E peculiar facts of that case and not as laying down any universal test. We would also take this opportunity to declare that the opinion expressed by Salleh Abas LP, namely, that the relationship of master and servant is not the criterion in determining whether a claimant is a workman does not, with great respect, truly represent the law upon the subject.

F In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 at p 311. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this G view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.

In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an H employer exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and I construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the

contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services. A

There is not a single satisfactory test that is available for the determination of the issue. However, most academics are agreed that the well-known pronouncements of Lord Thankerton in *Short v J & W Henderson Ltd* (1946) TLR 427, of Denning LJ in *Stevenson, Jordan & Harrison Ltd v Macdonald* (1952) 1 TLR 101, and of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; [1968] 2 WLR 775 come fairly close to the point. B

We approve the approach taken by Eusoff Chin J (now Chief Justice) in *Syarikat 3M Malaysia Sdn Bhd v Nik Kamaruddin bin Ismail* [1990] 1 MLJ 365, where he said (at p 366): C

> I am inclined to think that the Industrial Court was not concerned with nomenclature or position held by the claimant, but was concerned to get the truth of the claimant's duties and functions in the company. In this case in order to determine whether the claimant was or was not a workman, the Industrial Court had heard oral evidence, and perused documents submitted to it, and came to the conclusion that from the duties and functions performed by the claimant, he could not be said to be the mind and brain of the company. A figure-head director who merely signs documents as directed by the company's board of directors certainly cannot be said to be a part of the mind and brain of the company. D

E

The reference to the need to have been the brain or controlling mind of a company in the passage cited was necessary by reason of the decision in *Inchcape* which constituted binding precedent. That aside, the importance of the passage cited lies in the approach suggested by the learned Chief Justice, namely, an examination of the functions of the claimant. This establishes what we regard as the true principle: that it is incorrect to state in absolute terms as was done by Seah SCJ in *Inchcape* that a company director can never be a workman. F

Returning to the facts of the present appeal, it is clear from the evidence referred to by the Industrial Court in its award and from the terms of the agreement which the appellant had with the respondent, that the former had been engaged by the latter under a contract of service and not a contract for services. It is equally clear, from its award, that the Industrial Court addressed its mind to the nature of the duties and functions of the appellant as well as to the degree of control exercised by the respondent over him. It asked itself the right question and took into account relevant considerations when arriving at its decision. We are therefore of the view that the finding by the Industrial Court that the respondent is a workman, based upon its evaluation of the evidence adduced before it, is correct. Accordingly, we are satisfied that the Industrial Court did not commit any error of law when it came to its conclusion. G H

Counsel for the respondent complained of certain passages in the award in this case which he said showed that the Industrial Court had failed to make a proper assessment of the evidence before it. Additionally, counsel submitted that the Industrial Court, in the passages in question had given wrong reasons for the conclusion it arrived at. I

A The short answer to the first submission is that an application for the prerogative order of prohibition is not an appeal and neither the High Court nor this court is entitled to review the merits of any decision reached by the Industrial Court. Upon this point we need do no more than to refer to the following passage in the speech of Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at p 514; [1982] 1 B WLR 1155 at p 1173:

> I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed in *Ridge v Baldwin & Ors* [1963] 2 All ER 66 at p 91; [1964] AC 40 at p 96. His was a dissenting judgment but the dissent C was not concerned with this point. Lord Evershed referred to:
>
> > '... a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party D dismissed an opportunity for putting his case.'
>
> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.

E See also *State of Uttar Pradesh v Maharaja Dharmander Prasad Singh* AIR 1989 SC 997 at p 1010.

The answer to the second submission is this. The reasons given by the Industrial Court for the decision it reached are not in truth erroneous. In any event, assuming for a moment that the Industrial Court had given F wrong reasons for holding that the appellant is a workman within the Act — and we hasten to repeat that this is not the case here — its ultimate decision being correct, prerogative relief whether in the form of certiorari or prohibition ought to have been withheld from the respondent. For, it must not be forgotten that these remedies are discretionary and are not G available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-taker.

The true principle governing the grant of prerogative relief appears in the following passage in the judgment of Bose J in *Sangram Singh v Election Tribunal* AIR 1955 SC 425 at p 429:

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> That, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under Art 226. Their powers are purely discretionary and though no limits can be placed upon that discretion it must be exercised along recognized lines and not arbitrarily; and *one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of* I *case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense*, for, though no legislature can impose limitations on these constitutional powers it is a sound exercise of discretion to bear in mind the policy of the

> legislature to have disputes about these special rights decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case. (Emphasis added.)

In *Kewal Krishnan v Minister for Local Bodies & Ors* AIR 1959 J & K 17, the order of the Minister was challenged on the ground, inter alia, that the reasons contained in the order made by him contained wrong reasons for his decision. Wazir CJ, in refusing relief said (at p 19):

> Although the reasons given in the order of the Minister may be erroneous yet if the order can be supported on other valid grounds, writ of certiorari to quash that order cannot be granted.

Suffice to say that in the circumstances of this case, the ultimate decision being correct, no injustice of any sort, whether substantial or inconsequential, has been occasioned because of the alleged wrong reasons.

The learned judge who granted the order of prohibition did not, with respect, sufficiently consider the several points which we have addressed in this judgment. Having given this matter our most anxious consideration, we are of the view that prohibition ought not to have been issued. Accordingly, the appeal was, as indicated at the outset, allowed and the order of prohibition was set aside. We also remitted the case back to the Industrial Court with a direction that the appellant's complaint be heard and determined upon its merits.

Order accordingly.

Reported by Prof Ahmad Ibrahim